IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No. 204 of 2005
With
SPECIAL CRIMINAL APPLICATION No. 261 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE P.B.MAJMUDAR

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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JAYPALSINH J MANGROLA
Versus
STATE OF GUJARAT AND ANOTHER

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Appearance :
MR HR PRAJAPATI for Applicants.
MS MANISHA SHAH, APP for Respondent No. 1.
NOTICE SERVED BY DS for Respondent No. 2.

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CORAM : HONOURABLE MR.JUSTICE P.B.MAJMUDAR

Date : 15/12/2005

COMMON ORAL JUDGEMENT

Rule. Ms.Manisha Shah, learned APP, waives service of notice of

rule on behalf of respondent No.1. With the consent of the parties, both these applications are taken up for final disposal today.

These are the cases where the applicants have tried to stall the investigation and successfully avoided the order of remand passed by learned Magistrate against one of the applicants.

Few facts of the case are required to be noted. The concerned Police Inspector of Bharuch Police Station instituted a complaint being C.R. No.II - 59/2003 before the Hansot Police Station, District Bharuch, against the applicant – Jaypalsinh J. Mangrola and two other accused. As per the said complaint, on investigation of four water tankers which were stationary at Ambika Kerosene Depot, it was found that two tankers were having solvent and two tankers were having kerosene. As per the complaint, solvent worth Rs.65,000/- was found, while kerosene worth Rs.45,000/- was found. It was also noted that aforesaid articles were tried to be transported without appropriate license as required under the Essential Commodities Act and, therefore, it is presumed that it must have been transported for the purpose of black-marketing. After seizing the tankers, samples of the articles contained therein were taken for the purpose of sending it to Forensic Science Laboratory and complaint was registered under Section 307 of the Essential Commodities Act against the applicant, who was alleged to be the owner of the tankers in question, and other accused persons. It seems that the applicant had obtained the order of anticipatory bail from the competent Court and, thereafter, the investigating agency moved the competent Court for the purpose of getting remand of the applicant. The learned Magistrate granted remand of the applicant, which order was confirmed in revision

by the Sessions Court and even a Special Criminal Application preferred before this Court challenging the order of the Sessions Court was withdrawn unconditionally by the applicant. At the stage, when the police was trying to arrest the applicant and was trying to take him on remand for further interrogation, the applicant has filed this application for quashing F.I.R. by invoking extraordinary jurisdiction of this Court under Article 226 of the Constitution of India read with Section 482 of the Criminal Procedure Code.

Prior to filing of this application, one Ritesh Rakeshkumar Bhavsar, had filed Special Criminal Application No.261 of 2004 before this Court and has prayed for quashing of the aforesaid F.I.R. (the F.I.R., which is the subject matter of earlier Special Criminal Application), on the ground that he is the owner of the tankers in question and that the police wants to book him in connection with the aforesaid F.I.R. and therefore, it is prayed that aforesaid F.I.R. may be quashed. It is also the contention of the said applicant that even though he is the owner of the tankers and though he has not played any role in the commission of the alleged offence the police wants to book him. So far as this application is concerned, learned Single Judge of this Court while issuing notice has stayed further investigation of the aforesaid complaint.

Thereafter, the applicant of Special Criminal Application No.204 of 2005 has filed present Special Criminal Application by annexing the aforesaid order. Since entire investigation was stayed by the order passed in Special Criminal Application No.261 of 2004, the investigating agency has not proceeded any further with the investigation and as a result thereof, practically the remand order of the applicant of Special

Criminal Application No.204 of 2005, granted by the learned Magistrate and confirmed upto this High Court, could not see the light of the day. This shows the ingenuity on the part of the applicant. The applicant has not uttered even a single word about granting of remand by learned Magistrate and confirmation of that order by this Court in the memo of Special Criminal Application No.204 of 2005. So far as the applicant of Special Criminal Application No.261 of 2004 is concerned, the applicant has applied for releasing the tankers on the ground that he is the owner of said tankers. This was done obviously with a view to save the applicant of Special Criminal Application No.204 of 2005 from remand and also from any further proceedings. The learned Magistrate being unaware of the motive of the applicants has released the tankers by, prima facie, observing that the applicant is the real owner of the said tankers.

At time of hearing, learned Single Judge of this Court has passed following common order in both these applications on 13-4-2005.

> "During the course of the submission, on instruction received from Investigating Officer who has filed affidavit in reply today, learned Addl.Public Prosecutor Ms. Nandini V. Joshi has specifically submitted that the petitioner had not appeared before the concerned Police Officer on 1st March, 2005 though specifically ordered by this Court.
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> According to Mr.Prajapati, learned Counsel for the petitioner, the petitioner had appeared before the Authority, but as the stay was granted by this Court on 10th March instant, the concerned Police Officer in turn had informed that now the Stay has been granted, and, therefore, nothing more is required to be taken and he cannot be taken on police remand. So these two controversy facts required to be resolved, and, therefore, the petitioner shall file affidavit in detail as to who has committed this controversy.

According to Ms. Joshi, Ritesh has not good financial strength or otherwise strong financial background and the wrong things have taken shape, but for support of certain police officers who are facing departmental proceedings at present. So, on the next day of hearing petitioner of Spl. Criminal Appln. No.261 of 2004 shall file affidavit clarifying following facts.

(i) Whether he is an Income-tax payer.
(ii) Whether he is having any PAN Number.
(iii) Whether he himself has registered any service tax number.
(iv) Whether he is operating any bank account (with the details of such bank account).
(v) Details of his residential houses including house map and the area where it is located.
(vi) Whether he had borrowed account from any Nationalize or Cooperative Bank for purchase of motor vehicle like Truck or from Private Financier and if such details are necessary in affidavit then details of such banks and financier be given in the affidavit.

learned Judicial Magistrate First Class has decided to handover the custody of the muddamal tanker pending the criminal case under Section 151 of Cr.P.C.

Petitioner Ritesh meanwhile is directed not to send any of his tanker which is now in his custody under the order of the Court out of the limits of State of Gujarat without prior permission of this Court.

Xerox copy of R.C.Book be also produced before this Court and also the xerox copy of the Insurance Papers as to the third party insurance qua the same also be produced before the Court on the next date of hearing.

S.O. to 2nd May of 2005.

Interim relief granted earlier continue till then."

In compliance of the above order, Ritesh Rakeshkumar Bhavsar has filed his affidavit in Special Criminal Application No.261 of 2004,

wherein he has stated as under :

> "i) I am not the income tax payer ;
> ii) I do not have any PAN number ;
> iii) I have not registered any service tax number ;
> iv) I have a Bank Account being No. 4190 with Pragati Sahkari Bank Ltd., Kareli Baug Branch, Vadodara ;"

From the above averments, it is clear that the applicant has not even provided any details with regard to the balance of amount in his account. In view of the contents of the affidavit, which are narrated herein above, it is clear that the applicant of Special Criminal Application No.261 of 2004 has come forward by filing the application only with a view to save the applicant of Special Criminal Application No.204 of 2005.

According to learned APP, Ms.Manisha Shah, applicant of Special Criminal Application No.204 of 2005 is the real and main accused.

In the affidavit in reply filed by Deputy Superintendent of Police in Special Criminal Application No.261 of 2004, it is stated that no case is registered against the applicant of said application and the applicant is merely trying to save the skin of the applicant of Special Criminal Application No.204 of 2005. In paragraphs No.3 and 6 of the said affidavit-in-reply, it is stated as under :

> "3. I say that the present petition deserves to be dismissed with cost in as much as that the petitioner is a third person who is not connected in any manner with the present offence. The offence was registered against two persons Manharbhai Vithalbhai Vasava, Rajeshbhai Radheshyambhai Gupta and Jaipalsinh Jorawarsinh Marowara. The petitioner is not even shown as the accused, but it

appears that an attempt is made to bring in the petitioner to save the skin of the persons who are actually the offenders accused No. i.e. 3 or 4. In the course of the investigation it has come out that the present petitioner who identified himself to be the owner of these five tankers is not having financial capacity to maintain his own house. The statement to this effect is already taken by the investigating officer, of the mother of the petitioner. Copy of the petitioner is annexed at Annexure I. It is further borne out from the statement that the petitioner himself is working as reliever/helper of tanker as stop-gap arrangement therefore the present petitioner has no locus to file the present petition for quashing the complaint. I say and submit that so far as the ownership of the five tankers is concerned 3 tankers as per record of the RTO are running in the name of Gordhanbhai Bhagwanbhai Boliwal of Surat and two tankers are running in the name of Sureshpuri Goswami of Vadodara. However these tankers were purchased by Jaipalsinh Mangrola. However he had not transferred the same on the record of the RTO. I say that during the investigation the agreements regarding the transfer of the possession of the tankers were also recovered. In fact Mr.Boliwal had issued a notice through his advocate upon Jaipal to get his tanker registered under in his name with the RTO lest he be involved in any illegal activity that may be undertaken in connection of this tanker as they were running in his name.

6. I say and submit that Hon'ble Court be pleased to take serious view of the matters as to the game played by the petitioner and the original accused by abusing the process of this Hon'ble Court, by creating a document of rent of the vehicle/tanker in the name of the petitioner though the petitioner has nothing to do with the tanker and thus misleading this Hon'ble Court into passing of the order staying the investigation which is an abuse of the process of law by the petitioner himself and therefore cost to be inflicted upon the petitioner."

It is very surprising that though the applicant of Special Criminal Application No.261 of 2004 is not shown as an accused in the complaint, on his own, he moved an application showing him to be the owner of the tankers. What is more surprising is that there was nothing to show that

any proceedings are likely to be taken against him, then also he has filed aforesaid application for quashing the complaint. Therefore, it is very obvious that in order to help the applicant of Special Criminal Application No.204 of 2005, he gave an application before the Magistrate for getting back the muddamal tankers. Even as per the affidavit filed by the applicant in compliance of the direction given by this Court, it is admitted by the applicant that he is not paying the income tax nor he is having any PAN Number of Service Tax number etc. Therefore, it is clear that Special Criminal Application No.261 of 2004 is filed without any basis or reason or apprehension on the part of the applicant and only with a view to save the applicant of Special Criminal Application No.204 of 2005.

So far as Special Criminal Application No.204 of 2005 filed by the accused No.1 is concerned, as stated earlier, the relevant facts were suppressed by the applicant from this Court and taking advantage of the order passed by this Court in Special Criminal Application No.264 of 2004, this application is filed for getting identical relief, so that the remand order passed by learned Magistrate and confirmed upto this Court may become inoperative.

Considering the conduct of the applicants, in my view, these are not the cases in which this Court would like to exercise its extraordinary powers under Article 226 of the Constitution of India read with Section 482 of the Criminal Procedure Code for quashing the police investigation at its threshold. Still Mr.Prajapati requested that he may be heard on the merits of the case and, therefore, Mr.Prajapati was given an opportunity to address the Court on the merits of the issue.

Mr.Prajapati, learned advocate for the applicants submitted that non-mentioning of fact regarding grant of remand and confirmation of that order by this Court cannot be said to be material suppression as quashing of the complaint stands on different footing. Mr.Prajapati has relied upon certain judgements and stated that on suppression of such facts, petition should not be thrown away as it cannot be said to be suppression of material facts. However, in my view, so far as facts of the present case is concerned, non-mentioning of remand order by the Magistrate is of very vital importance and the applicant should have disclosed this fact in his application and because of non-mentioning of this fact and in view of the stay granted by this Court in Special Criminal Application No.261 of 2004, entire order of the Magistrate granting remand of the applicant is now frustrated.

Mr.Prajapati also submitted that in the present case, F.I.R. is required to be quashed by this Court while exercising its extraordinary jurisdiction, as according to him, the investigating officer was not authorized to investigate the case as under Clause–4 of the Solvent Control Order, 2000 only Gazetted Officers of the Central Government or the State Government or any police officer not below the rank of Deputy Superintendent of Police duly authorized, by general or special order of the Central Government or the State Government is entitled to take samples and only such person can investigate the case. He has also relied upon Rule–5 to substantiate his say that the anyone authorized in Clause – 4 can draw the sample from tank, nozzle or vehicle and for each product three samples are required to be taken. It is submitted by Mr.Prajapati that since the concerned police officer was not authorized to

draw the sample or sent for investigation, the F.I.R. is not tenable and therefore, F.I.R. is required to be quashed. He further submitted that as per the rules from each tanker three samples are required to be taken but in the present case this procedure is not followed and only one sample is taken from each tanker. Mr.Prajapati further submitted that even otherwise, as per F.S.L. Report the article which was found is Hydro Carbon Solvent, which is not covered under the provisions of the Essential Commodities Act, therefore, further investigation is not required to be undertaken as no case is made out and as per the material on record, it cannot be said that the articles which were seized from the tankers were essential articles.

Learned APP, submitted that initially, it was found that the concerned police officer was not carrying out the investigation honestly and, therefore, the investigation was entrusted to the Deputy Superintendent of Police and authorization for such investigation can be produced at the time of trial. She further submitted that this is a premature stage and at this stage, such authorization is not required to be shown. She has relied upon the affidavit in reply filed in Special Criminal Application No.204 of 2005 wherein the deponent has stated as under in paragraphs 6, 7, 8 and 9.

> "6. I say and submit that the offence was registered against three persons Manharbhai Vithalbhai Vasava, Rajeshbhai Radheshyam Gupta and Jaipalsinh Jorawarsinh Mangrola. The petitioner of Special Criminal Application no. 261/04 is not even shown as the accused. However, it appears that an attempt is made to bring in the petitioner of Special Criminal Application no. 261/05 to save the skin of actual offenders that is the present petitioner. In the course of investigation, it has come out that the petitioner of Special Criminal Application no. 261/04 who

identified himself to be the owner of these five tankers is not having financial capacity to maintain his own house. The statement to this effect is already recorded by the investigating officer, of the mother of the petitioner of Special Criminal Application no. 261/04. Hereto annexed and marked as Annexure-II is Copy of the statement. Hence, it is clear that the Special Criminal Application no. 261/04 is for quashing the complaint just to stall the investigation against the present petitioner.

7. I say and submit that originally, Police Sub-Inspector Hansot undertook the investigation and registered a non-cognizable offence. He drew the samples, which were sent for analysis to FSL at Surat. Thereafter the District Supply Officer, Bharuch, drew another sample and the same was sent for analysis. The third sample was drawn when the investigation was transferred to the LCB, Bharuch when the police officer called upon the officers of FSL Surat for spot verification and the preliminary report given by the scientific officer on the spot was with prima-facie the substance appeared to be solvent and kerosene. Thereafter the sample was drawn and sent to Surat FSL and in the report of the FSL it was opined that substance sent for analysis was toluene and not kerosene. I say and submit that it was notice by the higher officer that the investigating officers were not investigating the case properly. Further, it was also noticed that the investigation was carried on in such a manner to help the present petitioner. Disciplinary actions are taken against both the investigating officers by the Commissioner of Police for the irregularities committed by them for the said investigation. It is submitted that as the offence of Essential Commodities Act was registered and as the Police Inspector conducting the investigation was suspended and even otherwise as per the requirement of law the investigation was ultimately transferred to the present deponent. Upon taking over the investigation samples were drawn from the seized tankers and send for analysis to Gandhinagar FSL. Report of the Gandhinagar FSL clearly suggest that the substance seized is solvent covered under the solvent raffinate and slop (acquisition, sale, storage and prevention of use in automobiles) order, 2000. Therefore clearly the provisions of Essential Commodities Act are attracted.

8. I say and submit that so far ownership of the five tankers is concerned three tankers as per record of the RTO are running in

the name of Gordhanbhai Bhagwanbhai Boliwal of Surat and two tankers are running in the name of Sureshpuri Goswami of Vadodara. However, Jaipalsinh Mangrola purchased these tankers. But, he had not transferred the same on the record of the RTO. I say that during the investigation the agreements regarding the transfer of the possession of the tankers were also recovered. In fact, Mr.Boliwal has issued a notice through his advocate upon Jaipal, present petitioner, to get his tanker registered under in his name with the RTO, lest he be involved in any illegal activity that may be undertaken in connection of these tankers as these tankers are running in his name.

9. I say and submit that because of the lapse on the part of the earlier investigating officer whereby it appears that wrong opinion was given regarding the substance seized in tankers, departmental proceedings have been initiated against the erring officers. Copy of the suspension of the police inspector LCB is annexed herewith and marked as Annexure-III and the show cause notice issued to the Police Sub-Inspector Hansot police station is annexed herewith as Annexure-VI. The analysis report of Surat FSL and the Gandhinagar FSL are also annexed hereto and marked as Annexure-V (colly) for comparative study and this clearly goes to suggest the offence indeed committed and requires to be investigated. It is pertinent to point out that because of the order of this Hon'ble Court, the investigation is stayed and therefore even charge sheet has not been filed."

Learned APP submitted that as per the FSL report what has been recovered is Petroleum Hydrocarbon Solvent, which according to her, is covered under the provisions of the Essential Commodities Act. It is also submitted by learned APP that custodial investigation is necessary in this matter to find out the nature of transaction and for that purpose, investigating agency may also be permitted to take remand of the applicant.

Considering the affidavit-in-reply, it is clear that fresh samples were drawn by the concerned Deputy Superintendent of Police and the

investigation was thereafter carried further by the said officer. Details regarding this are given in paragraph 7 of the affidavit. In paragraph 9 of the reply, it is pointed out that the applicant has tried to corrupt the investigating officer, who was initially carrying out the investigation and ultimately such erring officer is placed under suspension and copy of such suspension order is also placed at Annexure-III to the reply.

After considering the aforesaid aspect of the matter, in my view, this is not a case in which F.I.R. is required to be quashed at the threshold, when the investigation is at large. It is required to be noted that this Court while deciding quashing proceedings is not deciding trial, therefore, the question of authorization of the concerned officer can be considered by the Magistrate at the time of recording evidence. In my view, it is not necessary to mention each and every minute details about taking samples in F.I.R. and in examination-in-chief the concerned person is required to give appropriate reasons in this behalf by giving particulars of taking sample etc.

Mr.Prajapati, however, tried to rely upon the order of the learned Single Judge of this Court, wherein a view has been taken that if there is lapse in taking sample, as required by law, the complaint can be quashed. However, in my view, facts of the present case are different and as per the affidavit in reply fresh samples were taken, which were sent for analysis and during the evidence the concerned Court can examine whether taking of fresh samples was violative of the provisions of law or not and this Court is not required to make rigorous inquiry in this behalf at this stage, by recording evidence or by cross-examining the complainant at this stage. From the facts of the case and even from the

affidavit filed by the applicant of Special Criminal Application No.264 of 2004, in view of the direction of the learned Single Judge of this court, it is clear that he is unable to satisfy the Court that he was paying income tax. Considering the aforesaid aspect of the matter, learned APP, submitted that the investigating agency may be allowed to move the learned Magistrate by filing appropriate application against the aforesaid application as from the affidavit it seems that the applicant may not be the owner of the tankers in question. On this aspect, I am not required to express any opinion, however, if any application is preferred in this behalf, it is for the concerned Magistrate to decide the same in accordance with law.

In view of above discussion, it is clear that both these applications are without any basis. It is also clear that the applicant of Special Criminal Application No.204 of 2005 has tried to stall the proceedings of criminal case with an ulterior motive of not obeying the order of remand passed by the learned Magistrate which is confirmed upto this Court. Filing of this kind of applications itself can be treated as abuse of process of law at the hands of the applicants, as one of the applicants has filed the present application even though there was no reason for filing such application and it is filed only with an oblique motive to save the applicant of Special Criminal Application No.204 of 2005. While the applicant of Special Criminal Application No.204 of 2005 has filed the application by suppressing certain facts. Considering the aforesaid aspect of the matter, this is not a case in which the Court would like to quash the complaint at its threshold as it cannot be said that this is the rarest of rare case in which this Court would like to quash the complaint. In this connection, reference is required to be made to the decision of the Apex

Court in the case of State of M.P. Vs. Awadh Kishore Gupta and Others reported in (2004) 1 SCC 691, wherein the Apex Court has observed as under :

> "13. It is to be noted that the investigation was not complete and at that stage it was impermissible for the High Court to look into materials, the acceptability of which is essentially a matter for trial. While exercising jurisdiction under Section 482 of the Code, it is not permissible for the Court to act as if it was a trial Judge. Even when charge is framed at that stage, the Court has to only prima facie be satisfied about the existence of sufficient ground for proceeding against the accused. For that limited purpose, the Court can evaluate material and documents on records but it cannot appreciate evidence. The Court is not required to appreciate evidence to conclude whether the materials produced are sufficient or not for convicting the accused. In *Chand Dhawan v. Jawahar Lal* it was observed that when the materials relied upon by a party are required to be proved, no interference can be drawn on the basis of those materials to conclude the complaint to be unacceptable. The Court should not act on annexures to the petitions under Section 482 of the Code, which cannot be termed as evidence without being tested and proved. When the factual position of the case at hand is considered in the light of principles of law highlighted, the inevitable conclusion is that the High Court was not justified in quashing the investigation and proceedings in the connected case (Crime No. 166 of 1994) registered by the Special Police Establishment, Lokayukta, Gwalior. We set aside the impugned judgement. The State shall be at liberty to proceed in the matter further."

Interim relief granted by this Court is already vacated, however, Mr.Prajapati submitted that interim relief granted earlier by this Court at the time of issuing notice may be continued for some time. In my view, this is not a case in which interim relief can be extended, as the request of the investigating agency for taking the applicant on remand is accepted by the Magistrate and even revision filed against that order was

dismissed, not only that a Special Criminal Application filed challenging the dismissal of revision application was also withdrawn and the applicant has suppressed all these facts.

Considering the aforesaid aspect of the matter, both these petitions are rejected. Notice is discharged.

(P.B.MAJMUDAR, J.)

After the order is dictated and before it is signed, Mr.Prajapati, learned advocate for the applicants requested that since the order is not signed, he may be permitted to withdraw both these applications.

Ms.Manisha Shah, learned APP, submitted that she has no objection if the applicants are permitted to withdraw these applications.

Permission is granted. Accordingly, both these applications are disposed of as withdrawn. Since Mr.Prajapati has withdrawn both these applications, observations made in the above order, naturally, would not affect the case of the applicants in any other proceedings pending before any other Court.

(P.B.MAJMUDAR, J.)

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